THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

The Honorable Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2020-CP-42-03593
Appellate Case No. 2021-000707

Trina Dawkins,
as Personal Representative of the Estate of William Dawkins,
Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC;
THI of South Carolina, LLC;
THI of South Carolina at Spartanburg, LLC;
THI of South Carolina at Magnolia Manor-Spartanburg, LLC
d/b/a Magnolia Manor-Spartanburg,
Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In the Spring of 2017, William Dawkins was discharged from the hospital for rehabilitation following major surgery. (Order Denying MTCA and Motions to Stay, p. 2). He was discharged to a Skilled Nursing facility operated by the Appellants in this case, Magnolia Manor of Spartanburg (hereinafter "Facility"). *Id.* According to the allegations in the Complaint, over the ensuing weeks, the Appellants and their agents failed to properly treat Mr. Dawkins, leading to severe injuries and multiple surgeries. *See* Complaint, ¶ ¶ 12 – 20.

The process of admitting Mr. Dawkins to the facility is at issue in this case, and the following is undisputed: There is no evidence that Mr. Dawkins had executed a Power of Attorney and thus appointed an attorney-in-fact; Mr. Dawkins had never been deemed incompetent during the course of any judicial proceeding, nor had a Guardian

been appointed for him; no physician had ever certified that Mr. Dawkins lacked the mental capacity to make his own decisions; Mr. Dawkins did not sign any paperwork at the time of admission, including either the Admission Agreement or the Arbitration Agreement (Arbitration Agreement, Admission Agreement pp. 1-12); There is no evidence that Mr. Dawkins was ever even presented with or consulted about any of the paperwork signed by his daughter, Melissa Dawkins (hereinafter "Melissa"), at the time of admission to the Appellants' facility.

Melissa did sign an Admission Agreement and an Arbitration Agreement at the time of her father's admission and signed both documents under a signature block that read: "Durable Power of Attorney for Health Care / Legal Guardian / Responsible Party." (Arbitration Agreement, Admission Agreement p. 12). Appellants do not dispute that Melissa did not offer a written Power of Attorney, a written Probate Court order, or any other legal document purporting to grant the authority to sign such documents. Appellants do not dispute that Melissa lacked any actual express legal authority to sign such documents.

The Respondent filed a Notice of Intent to File Suit in April of 2020, and after an impasse at the mandatory mediation, filed a Summons and Complaint on October 14, 2020, along with serving discovery requests[1]. (Order Denying MTCA and Motions to Stay, p. 2; Plaintiff's Interrogatories and Requests for Production to Facility; Facility's

[1] The record shows that the Respondent requested arbitration documents on at least three separate occasions: when making a pre-suit records request, when the Notice of Intent to File Suit was filed, and when Interrogatories and Requests for Production were served. Other than the one-page arbitration agreement, all documents upon which the Appellants rely were improperly withheld by the Facility which led to a finding on sanctions at the Circuit Court level. While the Respondent ultimately contends that these issues are largely irrelevant to the primary issue in this case, the enforceability of the contract at-hand, this portion of the procedural history does bear touching on due to some of the secondary issues raised in the Appellant's brief.

Responses to Interrogatories and Requests for Production[2]). The Defendants filed the Motions to Compel Arbitration and Motions to Stay this case on February 12, 2021 and February 21, 2021 (Defendants' Motions to Stay and Facility's Motion to Compel Arbitration). A hearing was held before the Honorable Judge Knie on March 16, 2021. The Court denied the Motion to Compel Arbitration and the Motions to Stay in an April 8, 2021 Order. (Order Denying MTCA and Motions to Stay). The central finding of the Circuit Court was that "there is no valid and enforceable contract. William Dawkins signed no Arbitration Agreement nor did he sign any other document giving Melissa the express authority to sign for him." *Id.* at 5. The Court further held that:

> when a healthcare facility attempts to bind a patient to an Arbitration Agreement signed by a family member, the facility must make a clear showing that the family member was a legal agent of the patient. . . . In this case, the Defendants have presented no evidence to show that Ms. Dawkins held herself out as her father's agent in any way . . . .
>
> *Id.* at 8.

The Court discussed the Appellants' late disclosure of the documents at issue in this appeal and the lack of timely pursuit of the arbitration defense, noting that

> [Appellants] gave no indication that they were pursuing an arbitration defense, despite repeated requests from the [Respondent]. [Respondent] further contends that the [Appellants] also refused to produced critical arbitration documents when requested and did not produce the documents or provide that this conduct continued for over a year and did not end until less than 24 hours prior to the hearing. . . . Further that Defendants failed to disclose that they intended to pursue merger and estoppel arguments based on the Admission Agreement or apparent or inherent authority agreements based on the Admission Agreement and healthcare consents.[3]

[2] Plaintiff specifically requested production of "Any arbitration Agreement which the Defendant claims is relevant to this case" along with "Any documentation that William Dawkins is the subject of that would not be contained in his medical record . . . ." The Facility refused to provide any answers or produce any documents, citing the Motion to Stay.

[3] In the Appellants initial brief, Appellants take issue with the Circuit Court's decision to consider an affidavit that it considers to have been "untimely" under Rule 6(d), however Respondent cites this portion of the Order to point out that the context of the timing of the events around the submission of Melissa's

Id. at 11-12. While the Circuit Court declined to immediately sanction the Appellants pursuant to Rule 11, SCRCP, the Court held that "said motion may be renewed by Plaintiff and heard by the trial judge in this action." *Id.* at 12.

Following a denied motion to alter, amend, and/or reconsider the decision, the Appellants filed a notice of Appeal on July 1, 2021. (Orders Regarding Motion for Reconsideration, Notice of Appeal).

STANDARD OF REVIEW

Whether a claim is arbitrable "is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The appellate court reviews the circuit court's determination of whether a claim is arbitrable under a de novo standard. *Chassereau v. Global Sun Pools, Inc.,* 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Timmons v. Starkey,* 380 S.C. 590, 595, 671 S.E.2d 101, 104 (Ct. App. 2008).

affidavit. This affidavit would have been submitted well in advance of the hearing but for the Facility's concealment of critical documents on which its case hinges.

ARGUMENTS

I. The Circuit Court properly denied the Motion to Compel Arbitration along with the Motions to Stay because there was no contract between William Dawkins and the Facility.

In determining whether a particular dispute can be compelled into arbitration, the Court must first determine whether a valid contractual agreement to arbitrate exists between the parties. The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.,* 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson,* 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Towles v. United Healthcare Corp.,* 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate. *Id.* South Carolina common law requires that in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Player v. Chandler,* 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a) (1978).

Appellants are effectively attempting a motion to enforce a contract. In the ordinary course, a nursing home resident who alleges injury would bring his claims before the Court as Respondent has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way for the parties to opt out of the judicial process. Appellants had no such contract with Mr.

Dawkins. The "Arbitration Agreement" on which Appellants' argument relies is invalid because, under bedrock contract principles, there can be no contract without the mutual assent of its proposed parties. Mr. Dawkins never signed the Arbitration Agreement and he did not empower Melissa to enter into such an agreement on his behalf. All of this is undisputed. The Appellants in this case cannot point to any evidence in the record which shows that Melissa had the legal authority bind her father to a contract of which he had no knowledge, much less to waive Mr. Dawkins' Constitutional right to a jury trial.

This case is on all fours with several recent South Carolina cases. Perhaps the case most analogous to the instant case is *Coleman v. Mariner Health Care, Inc*., 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). *Coleman* clearly stands for the proposition that South Carolina's Adult Health Care Consent Act allows for certain individuals, under certain conditions, to make health care conditions for patients who are unable to consent, *but that this authority absolutely does not extend to the execution of an arbitration agreement.*

The South Carolina Adult Health Care Consent Act provides the order of priority of persons who have authority make health care decisions for patients who are unable to consent. S.C. Code Ann. § 44-66-30 (2019). An inability to consent is a specific situation defined by statute, where "two licensed physicians, each of whom has examined the patient" certify that the patient lacks the ability to consent. S.C. Code Ann. § 44-66-20 (2014). This authority extends to health care decisions, and secondarily to financial decisions necessitated by those decisions. *Coleman v. Mariner Health Care, Inc*., 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). "An arbitration agreement is not considered to be a health-care decision when admission is not contingent upon its execution."

Thompson v. Pruitt Corp., 416 S.C. 43, 56, 784 S.E.2d 679, 686 (Ct. App. 2016) (citing *Cook v. GGNSC Ripley, LLC,* 786 F.Supp.2d 1166, 1171).

In *Coleman*, decedent's sister did not have power of attorney – she was authorized by the Act to make medical decisions for her sister – and when placing decedent in health care facility, executed both an admission agreement and arbitration agreement on behalf of decedent. *Coleman* at 350, 755 S.E.2d at 451-52. The court held that the scope of the Act is to ensure that the patient's wishes concerning her medical treatment are honored whenever possible, and that it does not confer authority to execute a document which involves neither health care nor financial terms for payment of such care. *Id.* at 352, 755 S.E.2d at 454.

Further, the court noted the importance of the "separatedness" of the arbitration agreement and admission agreement; specifically, there was a "Residential Admission and Financial Agreement" and an "Agreement for Arbitration." *Id.* at 355, 755 S.E.2d at 454-55.

> The scope of Sister's authority to consent to 'decisions concerning Decedent's health care' extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. We therefore affirm the circuit court's holding that the Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.

Id. at 353-54, 755 S.E.2d at 454. Because admission to the facility for health-related needs was not contingent upon execution of the arbitration agreement, it could not be said that the signatory had any authority to bind the patient as to the separate, voluntary arbitration agreement. *Id.*

In the *Hodge* case, the Resident was admitted to a nursing facility while competent and without any Power of Attorney. *Hodge v. UniHealth Post-Acute Care of Bamberg,* LLC, 422 S.C. 544, 550, 813 S.E.2d 292, 295 (Ct. App. 2018). Her husband signed all paperwork on her behalf, including an arbitration agreement. *Id.* at 550, 813 S.E.2d at 296. The Court of Appeals affirmed the Circuit Court's finding that:

> Husband's signing of the Arbitration Agreement, Admissions Agreement, and other forms does not make him [wife]'s agent. [Wife] did not have a health care power of attorney. Additionally, the Facility knew she was competent at the time of admission as indicated by the doctor's examination and allowed her to sign other forms. The record contains no evidence from the Facility that [Wife], as the principal, represented Husband was her agent.

Hodge at 573-74, 813 S.E.2d at 308. The Court found that even if the Husband did have the authority to make some decisions on her behalf, this did not extend to waiving the Constitutional right to a jury trial:

> Moreover, even if Husband had authority to handle finances or make health care decisions, as Appellants contend is evidenced by Husband signing past healthcare documents, this court has held 'the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.

Id. at 547, 813 S.E.2d at 308 (citing *Thompson,* 416 S.C. at 55, 784 S.E.2d at 686).

When Melissa signed the Arbitration Agreement and the Admission Agreement, she signed a signature block that identified her as either a "Durable Power of Attorney for Health Care," a "Legal Guardian" for her father, or her father's "Responsible Party." (Arbitration Agreement, Admission Agreement p. 12). There is no evidence that she was any of these things. Mr. Dawkins certainly did not sign either of the documents. Given

that the Appellants are unable to show that Mr. Dawkins or a legally authorized representative signed the agreements, the Appellants cannot show that a meeting of the minds occurred to form a valid state law contract.

This Court should follow the well-established law and rationale from *Coleman, Hodge,* and *Thompson.* In these cases, the Courts denied the nursing home defendants' motion to stay the action and compel arbitration because the loved one of the resident who signed the arbitration and/or admission agreements lacked capacity to bind the Resident to the arbitration agreement. In these cases, the person signing the agreement was not an authorized agent of the Resident of the facility and lacked the authority to bind that individual to an arbitration agreement, even if that individual did have the authority to make healthcare decisions for the Resident. That same result should follow in this case.

II. The Circuit Court properly rejected the Appellants' merger and equitable estoppel arguments.

Given that the Appellants are unable to demonstrate that the parties in this case have an actual agreement to submit their claims to arbitration, the Appellants have a fallback position that works as follows: Despite lacking any actual legal authority to do so, Melissa signed a separate admission agreement, which thus merged with the otherwise invalid arbitration agreement; given that Mr. Dawkins supposedly benefited from the provisions of this Admission Agreement (or his daughter is guilty of fraud, of which the facility was a completely unwitting victim), his daughter's signature on the Admission Agreement should estopp his estate from denying enforceability of the Arbitration Agreement. This argument fails for numerous reasons.

The entire argument is premised upon the idea that the two agreements merged, and everything else necessarily follows therefrom. However, the evidence of the record does not support merger, and the Circuit Court found that the two agreements had not merged. Particularly, the Court found that the two agreements were separate documents; contemplated interpretation under different bodies of law; were separately paginated, titled, and named; and had separate signature blocks. (Order Denying MTCA and Motions to Stay, p. 11). These findings were in line with well-established South Carolina law on this issue.

Merger does not occur where the documents recognize the "separatedness" of the arbitration agreement, which is indicative of an intent that the common law doctrine of merger not apply. *See Coleman* at 355, 755 S.E.2d at 455. In *Coleman,* Ann Coleman signed several documents, including arbitration agreements, when admitting her sister to a health care facility, and the facility made a similar merger/estoppel argument that the Appellants make in this case. *Id.* The circuit court denied the motion to compel in *Coleman*. *Id.* On appeal, the *Coleman* court found the language in the section titled "Entirety of Agreement" "recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts." *Coleman,* 407 S.C. at 355, 755 S.E.2d at 455. Furthermore, the court noted that the "Entirety of Agreement" clause creates an ambiguity as to merger, and "the law is clear that any ambiguity…is construed against the drafter…." *Id.* at 355-56, 755 S.E.2d at 455. The *Coleman* court ruled the circuit court properly denied [the health care facility's] equitable estoppel arguments because no merger occurred. *Id.* at 356, 755 S.E.2d at 455.

Additionally, merger does not occur where an arbitration agreement and admission agreement are governed by different law, reference each other separately, provide different mechanisms by which they can be revoked, are separately paginated, and have their own signature page. *See Hodge,* 422 S.C. at 562-563, 813 S.E.2d at 302. In *Hodge,* 422 S.C. at 550, 813 S.E.2d at 295, Mable Hodge entered a rehabilitation facility. *Id.* Mable's husband executed various documents related to her admission, including an arbitration agreement and an admission agreement. *Id.* Mable was not present at the time her husband signed these documents on the day before her admission because she was still in the hospital. *Id.* However, Mable was competent at the time of her admission. *Id.* 422 S.C. at 550, 813 S.E.2d at 296. The circuit court denied [the facility's] motion to dismiss or compel arbitration. *Id.* The facility appealed arguing the circuit court erred in finding the arbitration agreement was separate from the admissions agreement because the two documents were merged. *Id.* 422 S.C. at 556, 813 S.E.2d at 299. The Court of Appeals upheld the circuit court, finding the admissions agreement and arbitration agreement did not merge. *Id.* 422 S.C. at 563, 813 S.E.2d at 302.

The *Hodge* Court based its rulings in part on the fact that the "Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law." *Id.* 422 S.C. at 562, 813 S.E.2d at 302. Additionally, similar to *Coleman,* the Arbitration Agreement recognized separatedness because it referenced the two documents separately, "stating '[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.'" *Id.* Furthermore, the arbitration agreement stated it could be revoked within thirty days, while the admission agreement did not

contain such an indication; rather, it provided the admissions agreement could only be amended by the patient with written agreement executed by the facility and the patient. *Id.* The Court noted that each document was separately paginated and had its own signature page. *Id.* Finally, signing the arbitration agreement was not a precondition to admission. *Id.* at 562-63, 813 S.E.2d at 302. Based on this, the Court of Appeals found the admissions agreement and arbitration agreement did not merge. *Id.* at 563, 813 S.E.2d at 302. Therefore, because Mable received no benefit from the arbitration agreement, equitable estoppel did not bar Mable's claims. *Id.*

The instant case has many similarities to *Coleman* and *Hodge:* the Admission Agreement and the Arbitration Agreement are two separate documents; the Admission Agreement contemplates interpretation under state law while the Arbitration Agreement states that it is solely to be interpreted under federal law; the documents are separately paginated; the documents are titled separately; the documents have separate filenames; and, the documents have separate signature and date blocks. (Admission Agreement, Arbitration Agreement). The Admission Agreement also contains an Integration Clause, which states: "I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties . . . and may not be amended except by written agreement of the parties." (Admission Agreement, p. 12). The words "arbitration," or "alternative dispute resolution," or other similar terms are not mentioned a single time in the Admission Agreement. One must strain logic beyond anything comprehensible to be able to make the argument that a contract with an Integration Clause, *which explicitly states that it contains the entire understanding between the parties and that other*

writings are not part of the agreement, actually contemplated and included an entirely separate document which is never referenced a single time.

Contrary to the Appellants' suggestion, it is not at all clear that these two documents are meant to be construed or interpreted as a single document. Given that the Facility drafted these documents, and that this is an adhesion contract, it would have been easy for them to make that fact obvious. Any 'ambiguity' should be construed against them in accordance with South Carolina law. This Court should uphold the Circuit Court's proper finding that the documents did not merge.

Even assuming *arguendo* that the Circuit Court was in error by holding that the agreements did not merge, the Appellants must still make a showing that the doctrine of equitable estoppel should apply in order to prevent the Respondent from arguing that the arbitration agreement is enforceable. The Appellants' argument clearly fails on this issue as well.

"Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements." *Kelly v. Logan, Jolley & Smith,* 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). This defense requires proof that the party to be estopped **(1) acted in a way amounting to a false representation;** (2) intended that such conduct be acted on by the other party; and, (3) had actual or constructive knowledge of the real facts. *Strickland v. Strickland,* 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007) (emphasis added). The party asserting the estoppel must **(1) lack knowledge and the means of knowledge of the truth of the facts in question;** (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance of the conduct of the party to be estopped. *Id.* Equitable doctrines such as estoppel favor diligent parties

who actively endeavor to protect their rights. As person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. Of Fountain Inn,* 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

By its own admission, the facility in this case is a skilled nursing facility which provides medical services to large numbers of medically complex patients simultaneously. It is a sophisticated corporate entity which operates under the law of South Carolina and is doubtless aware of the impact that state and federal rules and laws have in this heavily regulated industry. The estoppel argument in this case fails because the Appellants are unable to show any false representation made by Melissa in the course of filling out paperwork, much less to show that they lacked the means to uncover that Melissa did not have the legal authority to act on her father's behalf.

A Power of Attorney does not exist in South Carolina unless there exists a "writing or other record that grants authority to an agent to act in place of the principal . . . ." S.C. Code Ann. § 62-8-102 (7) (2017). "A power of attorney must be: signed . . . . attested . . . [and] acknowledged or proved." S.C. Code Ann. § 62-8-105 (2017). A Guardian is "a person appointed by the court as guardian." S.C. Code Ann. § 62-5-101 (9) (2017). A Guardianship only exists where the Probate Court has entered "an appropriate order" appointing a Guardian, after making specific findings of facts as to the nature of the individual's incapacity. S.C. Code Ann. §§ 62-5-303D, 304 (2019). The Appellants have advanced no definition for the term "Responsible Party," but presumably this relates primarily to their attempt to collect money from any individual with their

signature on the document, as the Admission Agreement purports to require anyone who signs it to "[p]ay all fees and charges described in this Agreement." (Admission Agreement, p. 3). Perhaps most critically, the Admission Agreement required that Facility obtain proof of "any power of attorney, durable power of attorney, durable power of attorney for health care, or other legal documentation permitting the [Representative] to act on Resident's behalf." (Admission Agreement, p. 11). It is undisputed that the Facility did not do this at the time of admission, but this language shows that the Facility was plainly aware of its obligation to require such documentation under state law.

There is absolutely no evidence in the record that Melissa made any kind of false representation to the facility, outside of the self-serving language in the agreement cited by the Appellants. Nor is there any evidence that a skilled nursing facility or its agents were ignorant as to the meaning of terms, like Power of Attorney, that are vital to the everyday functioning of that particular industry. These are sophisticated corporate entities who regularly admit legally incapacitated individuals to their facility, and they cannot credibly claim to have been the 'victims' of a false representation here. Indeed in their initial brief, the Appellants entirely failed to address the both the false representation requirement and the knowledge requirement of South Carolina's longstanding estoppel case law. While Melissa did sign an adhesion contract to which she had no input, the Appellants have no credible argument that they relied on these representations to their detriment or would have done anything different but for some representation made by Melissa, and their argument clearly fails as to any doctrine of estoppel which requires a showing of fraud-like behavior.

This has led the Appellants to a final fallback position, the Direct Benefits Test to support an estoppel finding. In *Wilson,* the Direct Benefits Test cited requires that the non-signatory "may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him ." *Wilson v. Willis,* 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019). "Stated another way, '[u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement'" *Wilson* at 340, 827 S.E.2d 175-76 (citing *Belzberg v. Verus Invs. Holdings Inc.,* 21 N.Y.3d 626, 977 N.Y.S.2d 685, 999 N.E.2d 1130, 1134 (2013).

"Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.,* 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship.,* 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998). Where a contract lacks valuable consideration, the contract will be deemed unenforceable. Courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. However, in determining whether adequate consideration exists in a contract, or in an arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confides of the four corners of the instrument. *State Acc. Fund v. S.C. Second Injury Fund,* 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting *McPherson v. J.E.*

Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate; it does not.

There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the admission agreement. Admission can be the 'direct benefit' that forces Respondent to arbitrate only if admission and arbitration are governed by the same contract. In the case at hand, even assuming Melissa had authority, there is no valuable consideration in agreeing to the Arbitration Agreement. The one-page agreement contains no benefit or detriment to the parties. Therefore, where the Arbitration Agreement lacks consideration the court should not compel arbitration. Facility was prohibited from asking or receiving any consideration from Mr. Dawkins or any patient. Facilities must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan…any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii)(2021). Any nursing home facility that accepts Medicare or Medicaid funds for resident care is *expressly forbidden* from accepting any other money, benefit or other consideration as a precondition for admitting a patient to the facility or as a requirement for continued stay in a facility.

The Appellants would point towards the receipt of room, board, care, and treatment of a sick, elderly man as 'knowingly exploiting' the purported 'benefits' of the arbitration agreement, but this argument fails because there is nothing in the record to support the Appellants' contention that any valuable consideration supports the Arbitration

Agreement. The agreement itself does not discuss benefits to either party, and simply contains mutual promises to submit any dispute to arbitration. Finally, the Appellants cannot credibly point towards any attempt on behalf of Mr. Dawkins to 'exploit' any of the provisions of the arbitration agreement. He and his estate have always done the exact opposite.

III. The Circuit Court properly allowed the submission of Melissa's affidavit into the record and placed appropriate weight upon its contents in making its findings.

As a threshold matter, the Respondent contends that the Circuit Court reached the proper holding regardless of Melissa's affidavit, and that the affidavit was not necessary to make findings as to the existence of an agreement and the Appellants' merger/estoppel arguments. Melissa's affidavit was an opposing affidavit, submitted in opposition to the Facility's Memorandum. Rule 6(d), SCRCP. Less than twenty-fours hours prior to the hearing, and after the two day requirement for opposing affidavits to be submitted in Rule 6(d), SCRCP, the Facility submitted a 143-page filing to the Court, which included a 38-page memo advancing a number of legal arguments which had previously never been submitted to the Circuit Court; the 12-page admission agreement signed by Melissa; 5 pages of authorizations, consents, & acknowledgements signed by Melissa; a 2-page informed consent form signed by Melissa; and a consent form to participate in facility outings signed by Melissa. (Facility Memo in Support of Motion to Compel Arbitration).

Respondent had asked for these documents on at least three separate occasions but they had been withheld by the Facility. It is clear from the discussion above that the Admission Agreement is absolutely critical to the Appellants' argument. Notwithstanding their contention that the documents submitted at the last minute did not

constitute a 'trove,' the Appellants do not even make the pretense of advancing the argument that the Arbitration Agreement is capable of being enforced on its own unless it merges with the Admission Agreement. The issue was raised and the Court allowed for a submission from the Respondent after the hearing. Given that the Court cited to portions of Melissa's affidavit in its order, it seems clear that the Court was "permit[ting] [the affidavit] to be served at some other time." Rule 6(d), SCRCP. Perhaps the most relevant portion of Melissa's affidavit is the portion where she states that she told facility staff that her father "was capable of making his own decision, signing his own paperwork, that he did not have a legal guardian, and that he had not signed a power of attorney." (Plaintiff's Reply to Facility Memo In Support of Motion to Compel Arbitration, Exhibit G, Affidavit of Melissa Dawkins). This is not hearsay and the Appellants have never disputed that statement. They cannot dispute it.

Discovery did not take place because the Respondent was unwilling to agree to the onerous conditions imposed by the Facility (withdrawing the motions to compel arbitration and having them reset much later, causing further delay; agreement that engaging in discovery not allowed by the Arbitration Agreement would not waive the right to enforce arbitration; the inability to guarantee the production of a critical fact witness). (Defendant's Memorandum in Support of Motion to Reconsider at Ex. 2)

In short, the Facility was not willing to allow these depositions to proceed unless they became the perfect opportunity to have their cake and eat it too, no agreement was reached, and the Court agreed to decide the motion on the written submissions. If the Appellants had actually wanted to obtain sworn testimony from Melissa they could have noticed her deposition at any time between when suit was filed in October of 2020 and

the hearing on March 16, 2021; the Appellants chose not to do so for reasons of their own choosing. Those decisions should not be held against the Respondent in any way. Remanding the case to the Circuit Court for further discovery is not likely to shed any further light on the key issues of the case, and will only cause further delay and prejudice to the Respondent. The portions of Melissa's affidavit that touch on her actual legal authority to sign documents on behalf of her father are entirely undisputed, and reliance on the affidavit is not necessary to reach a conclusion as to the underlying contractual issues in the case. This is a red herring issue advanced by the Appellants to further delay the administration of justice in this case.

CONCLUSION

In short, the Circuit Court properly denied the Motion to Compel Arbitration and the companion Motions to Stay because there was no enforceable arbitration agreement between the parties, and the doctrines of merger and equitable estoppel do not apply to the facts of this particular case. While the Respondent contends that the Circuit Court properly considered Melissa's affidavit, that is a minor issue that is not outcome-determinative to the critical issue in this case: whether or not William Dawkins had a binding contract with the Appellants to arbitrate disputes arising out of his admission to the Facility. Such an agreement clearly did not exist.

For these reasons, Respondent respectfully requests that this Court hold that the Circuit Court properly decided the Motions to Compel Arbitration and the Motions to Stay, and to remand this case for further proceedings in the Circuit Court.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

Respectfully submitted,

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